

Civil Division – New Castle County

September 6, 2005

The Honorable William A. Oberle, Jr.
State Representative
Legislative Hall
P.O. Box 1401
Dover, DE 19903

Re: Rules Review of the Delaware River and Bay Authority

Dear Representative Oberle:

You have asked whether the Sunset Committee of the Delaware General Assembly is statutorily authorized to conduct a “rules review” of the Delaware River and Bay Authority (“DRBA”); and, in the event the Committee is so authorized whether it can compel DRBA Commissioners appointed by the Governor of New Jersey to attend any Committee proceedings and whether it can compel the production of DRBA documents related exclusively to activities of the DRBA occurring within the State of New Jersey. For the reasons set forth below, we conclude that the Delaware Sunset Committee lacks the statutory authority to conduct a “rules review” of the DRBA and therefore, is without authority to compel the attendance of DRBA

Commissioners at any Sunset Committee proceedings or to require the production of DRBA documents or other materials.

The Delaware River and Bay Authority

In 1962, the DRBA was created as a bi-state agency pursuant to the Delaware-New Jersey Compact (“the Compact”) entered into by the two states and approved by the Congress pursuant to the Compact Clause of the U.S. Constitution, art. I, §10, cl. 3. The Compact is codified at 17 *Del.C.* §1701 and *N.J. Stat. Ann* 32:11E-1 *et seq.* and approved by Congress in its present form at *Pub. L.* 101-565, 104 *Stat.* 2784 (Nov. 15, 1990).

Delaware and New Jersey entered into the Compact in order to advance “the economic growth and development of those areas in both States which border the Delaware River and Bay” 17 *Del.C.* §1701. Article IV of the Compact establishes the DRBA as “an agency of government of the State of Delaware and the State of New Jersey” for specified public purposes. *Id.* Article VII grants the DRBA the power to adopt bylaws, rules and regulations and to issue orders subject only to the requirement to “consult with appropriate officials of both States in order to ensure, as far as possible, uniformity of such rules, regulations and orders with the laws of both States.” *Id.* Finally, in Article VIII, the Compact provides that additional powers may be granted to the DRBA by legislation of either State to be exercised within that State without the consent of the other; however, it is further provided that “*no additional duties or obligations shall be undertaken by the [DRBA] under the law of either State or of Congress without authorization by the law of both States.*” *Id.* (emphasis added).

The Delaware Sunset Act

The Delaware Sunset Act (“the Act”), 29 *Del.C.* c. 102 establishes a system of periodic legislative review of *Delaware* commissions, boards and other agencies to determine whether there is a public need for the agency under review and, to determine whether the agency is correctly performing to meet that need. 29 *Del.C.* §10201(a) (emphasis added). The Act establishes the Delaware Sunset Committee to carry out its purposes and grants it powers necessary for conducting its reviews including the power to “issue process to witnesses at any place in [the] state and compel their attendance as well as the production of books, records, papers and other objects that may be necessary or proper for the purposes of the Committee’s proceedings.” 29 *Del.C.* §10206(a).

Additionally, the Act provides the Sunset Committee with the authority to conduct a “specialized or focused review of one or more rules or regulations of an agency.” 29 *Del.C.* 10212. In conducting this limited “rules review,” the Sunset Committee is authorized to convene an informational hearing, compile a “list of concerns” and determine what changes in the agency’s rules and regulations are deemed by the Committee to be necessary or appropriate to address its concerns. *Id.* If the Sunset Committee and the agency under review cannot reach agreement as to how to address the Committee’s concerns, the Committee “shall cause such legislation to be drafted as will . . . best accomplish its recommendations.” 29 *Del.C.* §10213(d).

Legal Analysis

As stated, the DRBA was created through the enactment of the Delaware-New Jersey Compact by the two States’ legislatures with the approval of Congress. This established the DRBA as a “bi-state entity;” a creation of “three discrete sovereigns: two States and the Federal

Government.” *Hess v. Port Authority Trans-Hudson, Corp.*, 513 U.S. 30, 40 (1990). Bi-state agencies like the DRBA are not to be regarded as extensions of each compacting state’s authority, but rather as “independently functioning parts of a regional polity and of a national union.” *Id. quoting Grad, Federal-State Compact: A New Experiment in Cooperative Federalism*, 63 Colum.L.Rev. 825, 254-855 (1963); *International Union of Operating Engineers, Local 542 v. Delaware River Joint Toll Bridge Commission*, 311 F. 3d 273, 276 (3rd Cir. 2002). As such, by entering into a compact, each state surrenders a portion of its own sovereignty to the newly created bi-state entity. *Delaware River and Bay Authority v. Carello*, 222 A.2d 794, 797 (Del. Ch. 1966).

Moreover, “bi-state entities created by compact . . . are not subject to the unilateral control of any one of the states that compose the federal system.” *Hess* at 42; see also *Carello* at 798 (“[W]here an interstate compact exists, one state to such an arrangement may not unilaterally legislate so as to place burdens on the compact in question.”); *Trubin v. Pavlo*, 1976 WL 171788 (Del. Super. 1976); *Delaware River and Bay Authority v. New Jersey Public Employment Relations Commission*, 270 A.2d 704 (N.J. App. Div. 1970) *aff’d* 277 A.2d 880 (N.J. Supr. 1971) (Holding that the New Jersey Public Employees Relations Commission did not have jurisdiction to certify a union as the exclusive negotiating representative for DRBA employees absent an express grant of such authority by both the New Jersey and Delaware legislatures.); *Bell v. Bell*, 416 A.2d 829 (N.J. Supr. 1980) (Holding that the New Jersey Tort Claims Act was not applicable to the Delaware River Port Authority, a bi-state agency created by a compact between New Jersey and Pennsylvania, because the New Jersey legislature did not have the power to modify by unilateral action the provisions of the bi-state compact.); *Delaware*

River Port Authority v. Commonwealth, State Ethics Commission, 585 A.2d 587, 589 (Pa. Cmwlt. 1991) (Finding that the Pennsylvania State Ethics Commission Act did not apply to the Delaware River Port Authority because to hold otherwise “would result in the unilateral imposition of the additional duties on the authority, which is impermissible absent express authorization in the compact or joint legislation by the two creator states.”)

Additionally, the express terms of the Delaware-New Jersey Compact provide that “no additional duties or obligations shall be undertaken by the Authority under the law of either State or of Congress without authorization by the law of both States.” Delaware-New Jersey Compact at Art. VIII.

Applying the well-established law leads to the inescapable conclusion that an attempt by the Delaware Sunset Committee to conduct a “rules review” of the DRBA; to seek to compel attendance at Committee proceedings of DRBA Commissioners appointed by the Governor of New Jersey; or to require the production of DRBA documents or materials related to activities conducted exclusively within the State of New Jersey, would constitute an impermissible unilateral imposition of additional duties on the DRBA. No such obligations are expressly authorized in the Compact nor do they result from any joint legislative effort of the Delaware and New Jersey legislatures. Accord; *Attorney General Opinion 82-F002* (Feb. 11, 1982) (Finding that the Delaware statute authorizing the Delaware Auditor of Accounts to audit state agencies does not extend to the DRBA in the absence of New Jersey legislation expressly consenting to the application of the Delaware statute to the Authority.)

Finally, the language of the Delaware Sunset Act itself precludes the Committee’s review of the DRBA since by its express terms, the Committee’s authority is limited to review of

Delaware agencies. *See* §§10201, 10202. Nothing in the Act indicates an intention to authorize a review of the Delaware River and Bay Authority or any other bi-state agency.

Conclusion

For the reasons stated, the Delaware Sunset Committee lacks the authority to conduct a rules review of the Delaware River and Bay Authority.

Very truly yours,

Keith R. Brady
Assistant State Solicitor

Approved by:

Malcolm S. Cobin, State Solicitor

Cc: Honorable M. Jane Brady, Attorney General
Philip Johnson, Opinion Coordinator